

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Date Issued: September 28, 2001

BALCA Case No. 2000-INA-174
ETA Case No. P1998-NY-02379044

In the Matter of

JILL ENFIELD,
Employer,

on behalf of

JEAN ANASTASIA FOYE,
Alien

Appearances: Indra Pal, Esq.,

Before: Chapman, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM: This case arises from an application for labor certification¹ filed by Jill Enfield for the position of Household Cook. (AF 18-19).² The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On March 26, 1997, Employer, Jill Enfield, filed an application for alien employment certification on behalf of the Alien, Jean Anastasia Foye, to fill the position of Domestic Cook. The job to be performed was described as follows:

Prepare/cook meals, bake bread/pastry. Purchase food stuff, clean kitchen, prepare

¹ Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File."

fancy dishes and prepare food for special diets, prepare platters/center pieces; decorate platters/baskets; wash/iron table linens, set table.

Total hours of employment were listed as 40 hours per week, from 1:00 to 9:00 p.m, with overtime "as needed". Minimum requirements for the position were listed as two years experience in the job offered.

Employer received eight applicant referrals in response to its recruitment efforts all of whom were rejected as either uninterested and/or unqualified for the position. (AF 76-77).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on July 19, 1999, proposing to deny labor certification on several bases. (AF 83-87). Citing Section 656.20(c)(8), the CO questioned the existence of a *bona fide* job opportunity open to any U.S. worker. The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" (those occupations requiring less than two years experience) is very limited, whereas, there is no current waiting period for most immigrant visas in the "skilled worker" category (at least two years experience). Because the occupation of Domestic Cook can require one to two years for proficiency, it is considered to be a "skilled worker" under the immigration law. Employer was instructed to explain why the position of Domestic Cook in their household should be considered a *bona fide* job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law. Rebuttal evidence, at a minimum, was to include responses to twelve enumerated questions including documentation where appropriate. In addition, the CO challenged the rejection of three U.S. worker applicants as for other than lawful job-related reasons, and instructed Employer to document proof of contact. The CO also challenged Employer's rejection of U. S. worker applicants for lacking experience in "diabetic" style cooking, as it was not listed as a requirement on the ETA form 750A nor advertised as such, and instructed Employer to document health necessity for the requirement.

In Rebuttal, Employer responded to each of the twelve questions presented, further discussed her rejection of the applicants cited by the CO, and submitted a physician's letter. (AF 88-100). Employer stated that the Alien would prepare on average three meals a day for their family of four, as well as, meal preparation for guests and entertaining her husband's clients. Employer indicated that they entertain guests twice a week. Employer stated that her husband is a publisher who works 8:00 a.m. to 5:00 p.m. but often comes home at staggering times. Employer states that she is a photographer, which requires a lot of traveling. She states she works from 9:00 a.m. to 3:00 p.m. "sometimes", but most of the time has a "very hectic schedule". Her girls, ages five and nine, attend school from 8:30 a.m. to 3:00 p.m. Employer states that they hire a part-time babysitter to care for the children when they are absent from the home and the Alien is fully engaged in meal preparation. Employer maintains that there are no other domestic workers employed in the household and that all the non-cooking duties are performed by her husband and herself.

A Final Determination denying labor certification was issued by the CO on September 29, 1999, based upon a finding that Employer had failed to adequately document that there is a *bona fide*

position for a Domestic Cook in their household. (AF 101-102). The CO observed that the daily schedule of the household did not coincide with the schedule of the Domestic Cook. The CO noted that one of the Cook's stated responsibilities was to prepare breakfast, yet her work day did not begin until 1:00 p.m. The CO further noted that Employer did not indicate whether her family brings home cooked meals to work/school for lunch or if they have lunch at home, and thus "it can only be assumed that the Domestic Cook is only responsible for preparing dinner". The CO also cited the fact that Employer had failed to submit an entertainment schedule, hence, it could not be determined to what extent the Domestic Cook would be involved in preparing food for guests. In addition, the CO found Employer's rebuttal lacking in that she had failed to adequately document contact of qualified U.S. workers, and noted inconsistencies in Employer's stated reasons for rejection.

Employer filed a Request for Administrative-Judicial Review on November 4, 1999. (AF 121-130). The matter was docketed in this office on April 3, 2000. Employer filed a Statement of Position brief on April 26, 2000.

DISCUSSION

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U. S. worker. This regulation means that the job opportunity must be bona fide, and that the job opening as described on Form ETA 750, actually exists and is open to U. S. workers. The burden of proof for obtaining labor certification is on the Employer who seeks an alien's entry for permanent employment. 20 C.F.R. 656.2(b).

Employer was instructed in the NOF that "[r]ebuttal documentation must clearly substantiate that the position of Domestic Cook in your household is, in fact, a bona fide job opportunity and not a position that was created solely for the purpose of qualifying the alien as a *skilled worker*." Specifically, Employer was instructed to provide documentation and responses to 12 questions enumerated by the CO.

In denying labor certification, the CO concluded that the details provided did not establish that there was a bonafide position for a Domestic Cook. We concur. In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), the Board set forth a "totality of circumstances" test to be used in order to determine the *bona fides* of a job opportunity in domestic cook applications. As stated by the Board in *Uy*:

The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or doubting the employer's veracity for the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

The burden of proving that the employer is offering a *bona fide* job opportunity is on the

employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*); 20 C.F.R. 656.2(b). As was noted by the Board in *Uy*, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8.

The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*) held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation." The Board went on, however, to state "[t]his is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve". The Board in *Uy* held that "a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." *Uy* at 9, citing *A. V. Restaurant*, 1988-INA-330 (Nov. 22, 1988); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989).

In the instant case, we find Employer's rebuttal documentation insufficient to establish that there is a *bona fide* position for a Domestic Cook in Employer's household. The position, as described by Employer, was to prepare three meals each day for her family of four, and meal preparation when she and her husband entertained. As was noted by the CO, Employer alleged that the Cook would be preparing three meals each day when there would be no one home to consume two out of the three. Employer has indicated that the Cook spends an hour each day in the preparation of breakfast and one to two hours each day in the preparation of lunch, yet the Cook does not arrive to begin preparation until 1 :00 p.m. Employer similarly failed to adequately document the household's entertainment schedule. The job as described requires the preparation of "fancy dishes", and the preparation and decoration of platters, center pieces and baskets, all presumably for entertaining. Employer provided no specifics regarding their entertaining except to state that they entertain at least twice a week, despite the CO's specific request to describe "in detail" how often they entertained in a twelve month period, including number of guests, number of meals served, *etc.*

Moreover, in applying the totality of circumstances test, we find it significant that Employer has provided no specific information whatsoever regarding who performs the other duties of maintaining the household, including childcare for their two young daughters and general housekeeping and maintenance of the home. Employer states that her five and nine year old arrive home from school at three o'clock. Employer states that no other domestic workers are employed in their household. In response to an inquiry regarding childcare, Employer states that "the children will be cared for by a part-time baby-sitter that we hire for the occasion". Employer has stated that her husband works full-time and that her career as a photographer "requires a lot of traveling" and "most of the time [she has] a very hectic schedule", which would not seem to be consistent with her position that all non-cooking duties are performed by her husband and herself. Notably, Employer did not respond to the CO's inquiry of whether the Alien will be required to perform functions such as child care, general cleaning or other non-cooking functions.

The record is wholly absent of verification for Employer's assertions. The CO would be

justified in drawing an adverse inference from such a lack of willingness to produce supporting documentation that would support the employer's case. *See, Uy, supra*. On this basis, we conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.